

1719431 (Migration) [2020] AATA 2954 (9 April 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1719431
MEMBER:	Scott Clarey
DATE:	9 April 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 of Schedule 2 to the Regulations; and • cl.820.221(1) of Schedule 2 to the Regulations.

Statement made on 9 April 2020 at 10:36am

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 –parties validly married – genuine married relationship at the time of application – compelling reasons for not applying the Schedule 3 criteria – credible and honest witness –decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant ([Mr A]) applied for the visa on 23 December 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that [Mr A] did not satisfy cl.820.211 because the delegate was not satisfied that the applicant is the spouse or de facto partner of the sponsor.
4. [Mr A] appeared before the Tribunal on 5 February 2020 to give evidence and present arguments. The Tribunal also received oral evidence from [Mr A]'s wife and sponsor, Ms [B], and Ms [B]'s daughter, [Ms C]. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
5. [Mr A] was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant ([Mr A]) is the spouse of his sponsor (Ms [B]).
8. **Relevant background**
9. [Mr A] is [an] [age]-year-old Indian national who was born in Mumbai but spent most of his life in Punjab. Ms [B] is [an age]-year-old Australian citizen who was born in India. [Mr A] was previously married and has one daughter from this relationship. This marriage ended in divorce in August 2015, however the couple had been estranged for an extended period prior. Both his ex-wife and daughter live in India and he seldom has contact with them. Ms [B] was previously married and has [number of children] [from] this marriage. Ms [B] separated from her ex-husband in 2013 and the divorce was finalised in June 2014.
10. [Mr A] first arrived in Australia in August 2009 on a student visa. This visa was cancelled by the Department in October 2011, a decision which was appealed and subsequently affirmed in April 2013. [Mr A] stayed in Australia unlawfully between May 2013 and December 2015. In December 2015 [Mr A] lodged a partner visa application based on his relationship with Ms [B]. In June 2016 this application was refused as the delegate was not satisfied there were sufficient compelling reasons to waive the Schedule 3 criteria. [Mr A] successfully appealed this decision to the Tribunal in October 2016. The application under review was subsequently assessed and refused by the Department in August 2017.
11. The couple met and began dating in mid-2014, and commenced frequent communication and contact from this time, although they were discrete about their fledgling relationship due

to cultural and other factors. The couple claimed to have bonded over their similar backgrounds and life histories, including their experience with failed (and tumultuous) marriages. [In] November 2015, [Mr A] and Ms [B] were legally married in Melbourne and on the same day [Mr A] moved in to live with Ms [B] and her [children] at her rented flat in [City 1], where the couple still reside.

Whether the parties are in a spouse or de facto relationship

12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case [Mr A] claims to be the spouse of the sponsor, Ms [B] who is an Australian citizen by grant.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

14. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. [Mr A] presented with his application a copy of the marriage certificate showing the marriage took place in Victoria [in] November 2015. There is nothing to suggest that the marriage is not valid. On the evidence, the Tribunal accepts the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

15. The Tribunal has carefully considered the documentary evidence on the Department's file and the substantial amount of additional evidence that has been submitted to the Tribunal (including a copy of the Department's decision record provided by [Mr A] and a detailed submission from his representative). The Tribunal also had the benefit of hearing the oral evidence of [Mr A], Ms [B] and a witness.
16. *Financial aspects of the relationship*
17. The Tribunal has considered the financial aspects of the relationship, including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
18. The Tribunal questioned the couple about their financial arrangements. Both [Mr A] and Ms [B] gave consistent evidence about each other's financial affairs. The Tribunal accepts that neither [Mr A] nor Ms [B] is employed. Ms [B] receives Centrelink payments on which the

couple subsist. I accept that [Mr A] receives periodic financial support from his family with which he contributes to household expenses.

19. There is evidence before the Tribunal that [Mr A] and Ms [B] operate a joint bank account with [two] banks. The Tribunal has had regard to a number of financial statements on the Tribunal's file for the joint accounts from the period November 2015 to present. Although the statements do not form a complete financial history over the period, the documents list various transactions that appear to pertain to living expenses, including groceries, utilities and medical bills.
20. The Tribunal has had regard to multiple submissions including utility, school invoices and vehicle insurance documents in joint names. The Tribunal accepts the couple's consistent oral evidence that [Mr A] is primarily responsible for the management of the couple's finances, including the physical payment of bills. The Tribunal notes and accepts that the couple jointly purchased a [car] in 2015.
21. The Tribunal questioned [Mr A] about issues raised in the delegate's decision relating to Centrelink and when it was notified about the relationship. The Tribunal is satisfied that the parties notified Centrelink of their relationship in January 2016 and does not share the delegate's concerns about this issue.
22. There is no other evidence of any major assets, joint liabilities and/or legal obligations owed by the parties in respect of each other.
23. The Tribunal accepts the couple's oral evidence in relation to the financial aspects of their relationship and notes that it is corroborated by some documentary evidence. The Tribunal places some positive weight on the financial aspects of the relationship.

24. *The nature of the household*

25. The Tribunal considered the nature of the household including any joint responsibility for the care and support of children, living arrangements of the parties and the sharing of the responsibility for housework.
26. The couple spoke about their living arrangements. The consistent evidence of the couple is that they have been in an exclusive and committed relationship since 2015, having first met in mid-2014. The Tribunal is satisfied they began living together when [Mr A] moved in to Ms [B]'s rented [flat] in [City 1] on their wedding day in November 2015. The Tribunal has had regard to copies of two rental agreements (for 2018 and 2019) for the [City 1] property that lists both parties as tenants. The Tribunal has also had regard to various submissions (including various utility and medical bills, and correspondence from Ms [B]'s [children's] school) addressed to either or both of the parties at their [City 1] address.
27. With respect to the sharing of the responsibility for housework, both parties told the Tribunal that they share household responsibilities and gave consistent oral evidence as to the general breakdown of these responsibilities. The Tribunal accepts that the couple share responsibility for grocery shopping, and that [Mr A] and his step[children] do most of the cleaning. Ms [B] is primarily responsible for cooking. The Tribunal accepts these claims.
28. The Tribunal places some weight on the nature of the household.

29. *Social aspects of the relationship*

30. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends

and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.

31. The Tribunal is satisfied that the parties have represented themselves socially to their family and friends as a couple and continue to do so at the time of this decision. The Tribunal has considered evidence relating to the social aspects of the relationship, including numerous photos provided to the Tribunal of the couple socialising together in various settings, and the largely consistent oral evidence of the couple at the hearing. The Tribunal notes that both [Mr A] and Ms [B] were able to name each other's closest friends when asked and recalled highly specific details of each other's extended family composition and circumstances. The couple gave largely consistent oral evidence of activities undertaken together and things that they enjoyed doing in their spare time: watching YouTube and listening to specific music, attending temple, meals they had eaten together, restaurants they had visited and specific details of recent shopping trips they had taken together.
32. The Tribunal has also considered various written statements, including from Ms [B]'s daughter [Ms C], [and others], which attest to the genuine and ongoing nature of the relationship. The Tribunal accepts these claims.
33. On the basis of the evidence before it, the Tribunal finds that the parties represent themselves to others as being married to each other, and that the couple plan and undertake joint social activities. The Tribunal finds that the relationship is viewed as genuine and continuing in the opinion of the couple's family members, friends and acquaintances.
34. The Tribunal is therefore satisfied that the social aspects of the relationship attest to the genuine and continuing spousal relationship between the parties.
35. The Tribunal places significant positive weight on the social aspects of the relationship.
36. *The nature of the persons' commitment to each other*
37. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
38. The Tribunal notes that both [Mr A] and Ms [B] gave evidence about the nature of their relationship and their personal circumstances which was both detailed and largely consistent. The Tribunal questioned both parties about their familiarity with each other and is satisfied that they both demonstrated detailed knowledge of each other's lives (and life histories) suggestive of a couple in a genuine and ongoing spousal relationship. This included highly detailed knowledge that [Mr A] demonstrated about the lives (and life histories) of Ms [B]'s [children] and ongoing support he provides to them.
39. The Tribunal is satisfied that the couple provide significant emotional support and companionship to each other. Both parties gave several specific examples of support that [Mr A] provides to Ms [B] with regard to the management of her ongoing health problems, including [a specified medical condition] and mental health issues. The Tribunal notes that [Mr A] was able to provide highly specific details (independently corroborated by Ms [B]) about Ms [B]'s health issues, treating doctors, recent medical appointments and treatments. The Tribunal accepts that the couple rely on each other for emotional support.
40. The Tribunal notes that the couple gave consistent oral evidence about plans they had made for their future in Australia, in the event that the visa application was successful. This included plans to open a [business] that both could work in. The Tribunal is satisfied that the

couple have had substantive discussions about their future together in Australia and have made credible plans in anticipation of the outcome of the review process.

41. The Tribunal notes that it has concerns about to some aspects of the parties' relationship narrative, including specific events and dates relating to the inception and development of the relationship, such as details relating to their engagement. While the Tribunal is concerned by [Mr A]'s inability to remember some of these key, basic details relating to the timeline of the relationship, when considering all of the evidence cumulatively and having regard to all aspects of the relationship, the Tribunal finds the weight of evidence does support that the parties are in a genuine and continuing relationship.
42. In light of all the evidence that is before it, the Tribunal finds that the parties see their relationship as a long-term one. Accordingly, the Tribunal is satisfied, considering all of the evidence cumulatively, that [Mr A] and Ms [B] have demonstrated, and continue to demonstrate, a level of commitment to one another and to their relationship as contemplated in the Regulations.
43. The Tribunal places significant weight on the nature of each person's commitment to the other.

44. *Conclusion on s.5F(2) requirements*

45. On the basis of the above the Tribunal is satisfied the parties are married to each other under a marriage which is valid for the purposes of the Act, and therefore at the time of application and time of decision the parties meet s.5F(2)(a).
46. The Tribunal is satisfied that at the time of application and the time of decision [Mr A] and Ms [B] have a mutual commitment to a shared life as a married couple to the exclusion of all others. The Tribunal is satisfied that the relationship is genuine and continuing. The couple therefore meet the requirements of s.5F(2)(b) and s.5F(2)(c) for a married relationship.
47. Additionally, the Tribunal is satisfied that at the time of application and time of decision [Mr A] and Ms [B] live together. Accordingly, the couple meet the requirements of s.5F(2)(d) for a married relationship.
48. For these reasons the Tribunal finds that at the time of application and time of decision [Mr A] and Ms [B] are in a married relationship within the meaning of s.5F(2) and therefore satisfy the definition of 'spouse' contained in s.5F of the Act.
49. The Tribunal is satisfied that at the time of application, and time of decision, [Mr A] was the spouse of a person who is an Australian citizen, and that he was sponsored by that person. The Tribunal finds that there is no evidence before it which indicates that Ms [B] was prohibited from being a sponsoring partner under cl.820.211(2B).
50. Accordingly [Mr A] meets the requirements of cl.820.211(2)(a) and (c).
51. The Tribunal is satisfied that although at the time of application [Mr A] did not hold a substantive visa, there were compelling reasons for not applying the Schedule 3 criteria. Therefore cl.820.211(2)(d)(ii) is met.
52. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore [Mr A] meets cl.820.211 and cl.820.221(1).

53. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

54. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221(1) of Schedule 2 to the Regulations.

Scott Clarey
Member

ATTACHMENT – Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).